IN THE

Supreme Court of the United States

October Term, 1965

NUMBER _____

J. P. SHELTON,

Petitioner

VS

THE STATE OF GEORGIA,

Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Now comes J. P. SHELTON, Petitioner in Certiorari, and petitions this Honorable Court for the writ of certiorari to the Court of Appeals of the State of Georgia.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia is reported unofficially in 141 South Eastern Reporter, 2nd 776, in response to an answer on certified question from the Supreme Court of Georgia on another question in

220 Ga. 610, (140 South Eastern 2nd 839.) The opinion of the Court of Appeals is appended hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1965, and a timely motion for rehearing filed on March 10, 1965, was denied March 16, 1965. A petition for certiorari to the Supreme Court of Georgia was filed April 14, 1965 and denied by that Court without opinion on May 10, 1965. An extension of time within which to file petition for certiorari was granted by Mr. Justice Hugo Black on August 3, 1965, granting petitioner until September 7, 1965, within which to file this petition for certiorari. The jurisdiction of this Court is invoked under Title 28, U.S.C. 1257 (3), giving this Court jurisdiction to grant certiorari to the final judgments of the highest court of a State in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether a defendant, charged with a criminal case in a State Court, has standing under the Fourth and Fourteenth Amendments to object to the introduction in evidence of papers and articles obtained through an illegal search and seizure of a parked vehicle by State officers, acting without consent and without a search warrant, when the indictment in the case charges the defendant with the unlawful possession of the automobile being illegally searched.

THE CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT FOUR to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT FOURTEEN to the Constitution of the United States:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner was indicted in the Superior Court of Fulton County, in the State of Georgia, on a three count indictment charging him with (1) larceny of an automobile, (2) having, buying and receiving the automobile, knowing it was stolen and (3) unlawfully possessing the same automobile, knowing at the time that an identification number had been falsified. Petitioner filed a pretrial motion to suppress the evidence. The trial court denied the motion without hearing evidence, and the motion was renewed after the jury had been empaneled, and during the trial of the case objection was made to the testimony of Captain Brown, a witness for the State, as to the results of a search of the automobile, alleged by the State to have been received and possessed by the defendant, on the ground that the search was conducted without a warrant. The objections and motions to suppress were

overruled, and the testimony of Captain Brown was permitted to go to the jury, including the introduction in evidence of certain checks and other articles found in the trunk of the car by the witness bearing the fingerprints of the petitioner, and the discovery by the witness that the identification number of the vehicle had been falsified and changed.

The testimony further disclosed that at the time the vehicle was searched it was not a moving vehicle, having been previously impounded, and was stored in a parking lot; that the witness had sufficient time to secure a search warrant; and that the witness did not have probable cause for making the search of the vehicle.

The petitioner was found not guilty of the first count charging the larceny of the automobile, but was found guilty on the second and third counts which both charged the petitioner with the possession of the vehicle. On appeal to the Court of Appeals of Georgia on this same question, and others, (the Court of Appeals having certified another question to the Supreme Court of Georgia) a new trial was ordered on the ground that the trial Court had improperly refused to allow a defense witness to testify, but the Court of Appeals also passed on the question of the admissibility of the evidence that was shown to have been seized from the same automobile to which petitioner had possessed, holding that such evidence "was not procured from any search of the defendant, or of any search of his residence or place of business, *or from an automobile to which he claimed a right of possession at the time the evidence was offered,* but from the allegedly stolen automobile after the police had determined that it was a stolen automobile."

The Court of Appeals then concluded this ground against the contentions of petitioner by holding:

> "A defendant *cannot successfully object* to testimony offered against him, on the ground that it was obtained by an illegal search and seizure of another person. This ground of the motion for new trial was properly overruled."

REASONS RELIED UPON FOR GRANTING WRIT OF CERTIORARI

1. Under the Georgia rule of "the law of the case" the ruling of the Georgia Court of Appeals, on the question of the standing of the defendant to complain of the illegal search of a vehicle alleged by the State to have been in his possession, will become binding authority on the trial court on a retrial of the case, whether right or wrong, and on a subsequent appeal of this same question not only the trial court, but the appellate courts of the State of Georgia would be bound thereby, and petitioner's constitutional right to challenge an illegal search would be lost forever. *Bryant* v. *State, 197 Ga. 641 (1), 30 S.E.2d 259.*

2. The Court of Appeals of Georgia refused to make a factual determination of the legality of the evidence obtained by the State officer, and declined to pass on the factual question as to whether the search of the vehicle was lawful or unlawful, but predicated their ruling on this important question solely on the ground that the petitioner "cannot successfully object" to the introduction of such evidence *because he had no standing to complain.*

3. The Court of Appeals of Georgia refused to rec-

ognize the case of Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 697, holding that in a case *"where the indictment itself charges possession,"* the defendant has standing to have the evidence suppressed, even though he fails to claim ownership or right of possession of the property or premises.

4. The Court of Appeals of Georgia refused to recognize Lanza v. New York, 370 U.S. 139, where this Court, in further approving the Jones case, supra, held that "in the eyes of the Fourth Amendment an automobile may not be unreasonably searched."

5. The Court of Appeals of Georgia also refused to recognize or apply the case of Jeffers v. United States, 187 F. 2d 498, affirmed 342 U.S. 48, 72 S. Ct. 92, where it was held that the right to the exclusion of illegally obtained evidence "does not depend on right to retain or repossess the property."

ARGUMENT AMPLIFYING REASONS RELIED UPON

Inasmuch as the Georgia courts recognize the "law of the case" rule as binding on them on a subsequent appeal, the petitioner's constitutional right to complain of the validity of the search and seizure will be lost forever if the Court of Appeals of Georgia does not decide the legality of the search and seizure in this case.

It is no valid or rational answer that the Court of Appeals finally found error in the trial court, and thus granted petitioner a new trial de novo on a State procedural error. The fact remains that the Georgia courts, up to and including the Supreme Court of Georgia by the refusal to entertain the petition for the writ of certiorari, have taken away petitioner's last right to complain of the outrageous conduct of one of its officers in rummaging through and tearing up a vehicle over which the petitioner, at that time, was powerless to control.

The jury found petitioner not guilty of the larceny of the vehicle. Thus, the only question that remains is whether petitioner had standing to object to the search of a vehicle alleged to have been in his possession by the allegations of the indictment; the instrument by which the State of Georgia maintains the right to prosecute this petitioner.

In Jones v. United States, 362 U.S. 257, it was held by this Court that a defendant had standing to complain of an unlawful entry and subsequent seizure of contraband *notwithstanding he testified that property seized was not his,* and that place of arrest was not his home. This Court held:

> "To hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government."

The failure of the Court of Appeals to determine the validity of the search and seizure in by-passing the issue with a ruling that the petitioner had no standing to complain, and in reversing the conviction and granting a new trial on an unrelated ground, has frustrated petitioner's constitutional right to attack the admissibility of the evidence procured as a result of the search and seizure by operation of the "law of the case" rule as applied by the Georgia courts. Petitioner is faced with another trial on the merits, legally unable to assert a successful objection to incriminating articles that may otherwise have been held inadmissible.

APPENDIX

(a) Attached hereto is a copy of the judgment and opinion of the Court of Appeals of Georgia in its entirety.

(b) Attached hereto is a brief synopsis, with citation

as to the record, of the manner in which the question of the illegality of the evidence objected to was raised in the trial court.

Respectfully submitted,

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APPENDIX A

SHELTON v. STATE

COURT OF APPEALS OF GEORGIA No. 40797

1. Where the rule requiring that witnesses be examined out of the hearing of each other (Code 5 38-1703), has been invoked a witness who has remained in the courtroom during the progress of the trial is not disqualified from testifying.
2. A witness who gives a responsive answer is properly allowed to explain such answer.
3. Where the record does not disclose the grounds upon which a motion for mistrial was made during the trial of the case no question is presented for review.
4. The trial court did not err in admitting in evidence photographs and a record of fingerprints of the defendant for the purpose of establishing identity.
5. One charged with larceny will not be heard to raise nice and delicate questions as to the title of the article stolen.
6. No harmful error is shown by the seventh ground of the motion for new trial.
7. The excerpts of the charge excepted to in special grounds 9, 10 and 11 show no error.
8. A defendant cannot successfully object to evidence allegedly obtained as a result of an illegal search and seizure of another person's property and to which the defendant disclaims any interest.
9. Where an indictment charges in separate counts larceny and receiving stolen goods the State is not required to elect upon which ground it will travel and insist upon a conviction.

10. The evidence did not demand a verdict for the defendant.

The defendant was indicted in a three-count indictment for 1 larceny of a described automobile, 2 receiving stolen property knowing the same to have been stolen, and 3 possessing a stolen automobile knowing that the identification number had been removed and falsified with intent to conceal and misrepresent the identity of said automobile. On the trial of the case the jury returned a verdict of not guilty on the first count and of guilty on the second and third counts. Thereafter, the defendant's amended motion for new trial was overruled and he now assigns error on such adverse judgment.

NICHOLS, Presiding Judge. 1. Special ground 1 of the amended motion for new trial assigns error on the refusal of the trial court to permit a witness for the defendant to testify. The record discloses that the "rule" had been invoked and that the witness had remained in the courtroom for various periods of time during the progress of the trial while other witnesses testified.

Under the decision of the Supreme Court in response to a certified question by this court (Shelton v. State 220 Ga. 610, 140 S.E.2d 839), the witness was not disqualified from testifying in the case and while the defendant did not notify the trial court at that time as to the facts he expected to prove by such witness it was because the trial court refused to permit such showing.

An examination of the expected testimony of such witness contained in the amended motion for new trial shows that while some of such testimony would not have been admissible over proper objection other parts of such expected testimony was admissible and relevant.

Accordingly, the trial court erred in overruling such ground of the defendant's motion for new trial.

2. Special ground 2 complains that the trial court erred in failing to exclude a part of an answer to a question asked a State's witness by the defendant as being not responsive to the question asked. The witness answered the question with a "no sir" and then explained his answer as he is permitted to do. See Marques v. Ross, 105 Ga. App. 133, 138 (123 SE2d 412), and citations. The answer was responsive to the question asked and is therefore distinguishable from cases exemplified by Henderson v. State, 208 Ga. 73 (65 SE2d 175), where the witness stated a legal conclusion, and Mickle v. Moore, 188 Ga. 444 (6) (4 SE2d 217), where the answer was not responsive to the question asked.

3. Special grounds 3 and 5 complain that the trial court erred in failing to grant a mistrial on motion of the defendant, but such grounds do not disclose the grounds on which such motions were made during the trial of the case. "The motion for new trial merely states that counsel made a motion for a mistrial, which was overruled by the court, and nowhere therein is it stated upon what grounds counsel moved the court for a mistrial. The contentions of counsel as shown by this ground as to why a motion for a mistrial should have been granted do not appear to have been urged before the trial court. This ground of the motion for new trial is too defective and incomplete to present any question for decision, and the trial judge did not err in overruling it. Owens v. State, 32 Ga. App. 417, 418 (2) (123 SE 919); Lumbermens Underwriting Alliance v. First National Bank & Trust Co., 100 Ga. App. 217, 223 (5) (110 SE2d

782)," Whitehead v. State, 101 Ga. App. 732 (115 SE2d 429).

4. Under the decision of the Supreme Court in Cooper v. State, 182 Ga. 42 (2) (184 SE 714; 104 A.L.R. 1309), the trial court did not err in admitting in evidence a photograph of the defendant which was identified by various witnesses to connect him with possession of the stolen automobile, and for the same reason a fingerprint record made by one of the witnesses for the State was properly admitted over the defendant's objection. Special grounds 4 and 8 are without merit.

5. Special ground 6 which complains that the trial court erred in refusing a timely written request to charge that the defendant could not be convicted if the automobile was the property of the wife of the person named as the owner in the indictment or the joint property of such person and his wife. As pointed out in Thomas v. State, 125 Ga. 286 (54 SE 182), one charged with larceny will not be heard "to raise nice and delicate questions as to the title of the article stolen." See also Lawrence v. State, 26 Ga. App. 607 (107 SE 621); Morton v. State, 73 Ga. App. 307 (36 SE2d 120), and citations. The trial court did not err in failing to give the charge requested.

6. Special ground 7 complains of the exclusion of certain testimony sought to be elicited from a State's witness while on cross examination. The trial court did not exclude any testimony but only ruled that the question asked was too vague and indefinite, and that it should be more specific. No harmful error is shown by this ground of the motion for new trial.

7. Special grounds 9, 10 and 11 complain of excerpts

of the court's charge. Each of these grounds has been carefully examined and is without merit.

8. Special ground 12 complains of the failure of the trial court to exclude evidence allegedly obtained as a result of an illegal search and seizure so as to make such evidence inadmissible under the decisions of Mapp v. Ohio, 367 U. S. 643 (81 S. C. 1684, 6 SE2d 1081); Dennis v. State, 108 Ga. App. 646 (134 SE2d 519), and similar cases construing and applying constitutional provisions against illegal searches and seizures and the applicability to the admission of evidence in criminal cases.

The evidence objected to in the present case was not procured from any search of the defendant, or of any search of his residence or place of business, or from an automobile to which he claimed a right of possession at the time the evidence was offered, but from the allegedly stolen automobile after the police had determined that it was a stolen automobile. As was held in Jones v. State, 4 Ga. App. 741 (62 SE 482): "A defendant . . . cannot successfully object to testimony offered against him, on the ground that it was obtained by an illegal search and seizure of another person . . ." This ground of the motion for new trial was properly overruled.

9. Special ground 13 of the motion for new trial complains that the trial court erred in refusing to require the State to elect whether to travel and insist upon a conviction upon count 1 (larceny of an automobile) or count 2 (receiving stolen goods). This judgment of the trial court was not error. See Freeman v. State, 35 Ga. App. 223 (1) (132 SE 782), and citations.

10. The evidence adduced on the trial of the case consists of over three hundred pages and it would indeed

serve no useful purpose to set forth such evidence here, and since the case must again be tried the usual general grounds of the motion for new trial will not be passed upon except to state that the evidence did not demand a verdict for the defendant.

Judgment reversed. Hall and Russell, JJ., concur.

COURT OF APPEALS OF THE
STATE OF GEORGIA

Atlanta, March 3, 1965

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

J. P. Shelton v. The State

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed because the trial court erred in overruling the defendant's motion for new trial. Nichols, P.J., Hall and Russell, JJ., concur.

Bill of cost, $15.00

APPENDIX B

MANNER OF RAISING QUESTION IN TRIAL COURT

Tr. 17 Written motion to suppress evidence prior to trial..

Tr. 12 Renewing motion to suppress after jury was empaneled and before any evidence was introduced.

Tr. 13 Renewing motion to suppress during the testimony of Captain Brown.

Tr. 13 By renewing the motion to suppress evidence and objecting to the introduction of seized evidence at the time it was offered by the State.

Tr. 13 By renewing motion to suppress evidence at the conclusion of the State's case and at the conclusion of all the evidence in the case.

Tr. 15 The approval of the grounds of the motion for new trial by the trial judge and certificate that the grounds are true and correct.

Tr. 12 Motion for new trial.